The Honorable James L. Robart
The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WILFREDO FAVELA AVENDAÑO, et al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

Case No. 2:20-cv-700-JLR-MLP

PETITIONERS-PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO THE NWDC WARDEN'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
April 30, 2021

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INTRODUCTION

Petitioners-Plaintiffs (Plaintiffs) are persons detained at the Northwest Detention Center (NWDC) who are vulnerable to serious illness and death from COVID-19. While Immigration and Customs Enforcement (ICE) is the one who has placed them in detention there, the Defendant Warden of the NWDC administers the facility and is responsible for many of the conditions there. In recent months, many of the Warden's employees—who work for the private prison corporation GEO Group, Inc. (GEO)—have tested positive for COVID-19, frequently threatening to introduce the often-deadly virus into the facility. Nevertheless, GEO has refused to implement periodic testing of its employees—something that GEO's co-defendant ICE has realized is a necessary precaution to help protect detainees, as evidenced by ICE's decision to periodically test some detainees. Not only has GEO refused to engage in this testing, but in its motion for summary judgment, GEO claims for the first time (after over ten months of litigation) that it cannot be sued, that the NWDC Warden is not a proper party, and that this Court does not even have jurisdiction to grant equitable relief as to GEO. Supreme Court and Ninth Circuit precedent squarely reject these arguments. This Court should accordingly deny Defendant's motion for summary judgment, grant Plaintiffs' cross-motion, and order the periodic testing of GEO staff until COVID-19 no longer poses a threat to the certified class.

In the alternative, the Court should deny or defer a decision on summary judgment under Federal Rule of Civil Procedure 56(d). Plaintiffs have not had an opportunity to pursue class-related discovery or complete discovery regarding all Defendants' implementation of COVID-19 policies. Indeed, this Court has repeatedly limited discovery to one Named Plaintiff, Naeem Khan. Relatedly, as the ICE Defendants have recognized, the Warden's motion is now

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premature, as it pertains only to the remaining detained named plaintiff. Dkt. 249. As a result, and at a minimum, the Court should deny or defer Defendant's motion on the merits.

LEGAL STANDARD

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party carries the burden of demonstrating that no genuine issues of fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The Court may not grant summary judgment if a "reasonable juror, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *James River Ins. Co. v. Herbert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

Under Federal Rule of Civil Procedure 56(d), the Court may also deny or defer consideration of a summary judgment motion and allow additional time for discovery where parties "have not had sufficient time to develop affirmative evidence." *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002).

ARGUMENT

I. The Current NWDC Warden May Be Sued for Injunctive Relief.

A. Plaintiffs May Sue the NWDC Warden for Injunctive Relief for Constitutional Violations.

In his motion, Defendant asserts that as a "private employee working for a private company," he cannot be sued for injunctive relief. Dkt. 239 at 6. To make this argument, Defendant misstates Supreme Court law that is directly on point and which makes clear that he is wrong. Moreover, for similar reasons, and as Plaintiffs will explain, this same principle demonstrates that the NWDC Warden is a proper party and that injunctive relief requiring testing would be appropriate.

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As an initial matter, there is no question that an implied cause of action exists under the Constitution for a detention facility's failure to provide conditions compliant with the Fifth Amendment. "Courts have long recognized the existence of an implied cause of action through which plaintiffs may seek equitable relief to remedy a constitutional violation." *Hernandez Roman v. Wolf*, 977 F.3d 935, 941–42 (9th Cir. 2020); *see also Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 326–27 (2015); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . ."). This includes conditions lawsuits like this one, as "an implied cause of action exists for [detained immigrants] to challenge allegedly unconstitutional conditions of confinement." *Hernandez Roman*, 977 F.3d at 941 (citing, inter alia, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862–63 (2017) and *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979)); *see also Zepeda Rivas v. Jennings*, No. 20-16276, No. 20-16690, 2021 WL 631805, at *3 (9th Cir. Feb. 18, 2021) ("District courts 'possess[] broad equitable authority to remedy a likely constitutional violation.'" (alterations in original) (quoting *Hernandez Roman*, 977 F.3d at 945)).

There is also no question that this principle extends to private contractors who act as the immediate custodian of a federal detainee. In his brief, Defendant simply distracts from this central fact by claiming that there is no liability under Section 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Dkt. 239 at 6. But Plaintiffs are not seeking damages here, nor do they claim that *Bivens* applies or that GEO is a state actor that can be sued under 42 U.S.C. § 1983. Instead, they seek injunctive relief for constitutional violations. And with respect to that remedy, the law is clear. Indeed, *Correctional Services Corp. v. Malesko*—a case that Defendant cites—demonstrates this fact. 534 U.S. 61, 74 (2001); *see*

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also Dkt. 239 at 6 n.20. There, the Supreme Court held that while a *Bivens* remedy was not available against the defendant in that case—a private prison company—a detained or imprisoned person held by that private facility still had access to "suits in federal court for injunctive relief." *Malesko*, 534 U.S. at 74. As the Court went on to explain, "unlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.*

Federal courts across the country have recognized that private detention facilities may be sued for constitutional violations in accordance with this longstanding principle. Most notably, in *Hernandez Roman* itself, one of the Defendants was the Warden of the Adelanto ICE Processing Center—a GEO employee, just like in this case. 977 F.3d at 938 n.1. Despite that fact, the Ninth Circuit concluded that an implied cause of action was available against all the defendants in that case. *Id.* at 941–42. Though *Hernandez Roman* is directly on point, Defendant never cites it or tries to distinguish its conclusion that injunctive relief is available against the warden of a privately-run detention facility. *See* Dkt. 239 at 6. Moreover, other courts agree with *Hernandez Roman*. As one explained, "because GEO performs the federal function of holding immigration detainees, the conditions of confinement at its facilities are the result of 'state action' and it may be liable for constitutional violations." *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1057 (C.D. Cal. 2019); *see also, e.g.*, *Picone v. U.S. Marshal Serv.*, No. 4:15cv2033, 2016 WL 5118303, at *4 (N.D. Ohio Sept. 21, 2016) (injunctive relief available against private prison employees); *Montes v. McAdam*, No. 5:14-CV-005-C, 2014 WL 5454843, at *2 (N.D. Tex. Oct. 27, 2014) ("An inmate incarcerated at a private prison, such as Dalby Facility, may seek remedial action in federal court via an action for injunctive relief." (citing *Malesko*, 534 U.S. at

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74)); *Diaz v. Dixon*, No. 5:13-CV-00130-C, 2014 WL 1744110, at *4 (N.D. Tex. May 1, 2014) (similar); *Hernandez v. Dixon*, No. 5:12-cv-00070-BG ECF, 2012 WL 6839329, at *2–3 (N.D. Tex. Dec. 12, 2012) (similar).

Defendant's claim that *Martinez v. GEO Group*, No. ED CV 18-1125-SP, 2020 WL 2496063 (E.D. Cal. Jan. 7, 2020), suggests otherwise is plainly misleading. Dkt. 239 at 6 & n.21. In that case, the court rejected only the claim that a private prison contract could be liable for *damages under Section 1983*. *Martinez*, 2020 WL 2496063, at *17. Defendant cites no page number in the case for his assertion that *Martinez* shows "a direct constitutional claim" for injunctive relief is "not a valid legal theory," and Plaintiffs have been unable to find any authority in the case for that proposition. Dkt. 239 at 6 & n.21. *Martinez* is simply inapposite, and Supreme Court and Ninth Circuit precedent squarely foreclose any claim to the contrary. For all these reasons, the Court should conclude that Plaintiffs may sue the Warden of NWDC for injunctive relief.

B. The Warden of the NWDC Is A Proper Party.

Defendant also contends that he is not a proper party to this lawsuit because he does not "have the legal reality of control" over Plaintiffs' detention. Dkt. 239 at 3. Defendant, however, misconstrues Plaintiffs' claims. Plaintiffs have requested injunctive relief that extends beyond release, and such relief may be demanded of a detention facility warden regardless of whether the warden is a private contractor, as described above. Dkt. 167 at 36. Moreover, the NWDC Warden is a public officer exercising public functions, regardless of whether ICE chooses to hire a contractor for that position. Thus, the NWDC Warden is a proper party and Stephen Langford's

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replacement, Bruce Scott, should be automatically substituted for him. *See* Fed. R. Civ. P. 25(d).[1]

First, Defendant misconstrues Plaintiffs' claims. While it is true that one remedy Plaintiffs seek is their release or a process by which to consider them for release, they also seek conditions-oriented relief to make any continued detention safer. This is evident on the face of Plaintiffs' complaint, as Plaintiffs have requested periodic testing of Defendant's employees, a fact Defendant never acknowledges. *See* Dkt. 167 at 35. Moreover, Plaintiffs requested "other and further relief that [the] Court may deem fit and proper," *id.*, which Plaintiffs submit may be appropriate in light of the increasing availability of vaccines, *see* Pls.' Mot. for Partial Summ. J. Regarding COVID-19 Vaccines at 16–18. Indeed, the Court recently recognized this fact in adopting the Magistrate Judge's Report and Recommendation on Plaintiffs' Motion for Class Certification, observing that "Petitioners' amended petition and complaint seeks relief other than release, specifically injunctive relief regarding the current conditions of confinement at NWIPC, such as the ability to social distance, ability to maintain proper hygiene measures, screening of new detainees, and use of personal protective equipment." Dkt. 209 at 11; Dkt. 245 at 3. As the case law cited above makes clear, this sort of injunctive relief is available against the NWDC Warden in his capacity as the Warden. Accordingly, the Warden is a proper party here. *See Hernandez Roman*, 977 F.3d at 941–42.

Second, it makes no difference that Stephen Langford is no longer the Warden of NWDC. Plaintiffs sued Stephen Langford in his "official capacity" as "Warden of the Tacoma

[1] It is clear that Bruce Scott fills the same role as that of his predecessor, Stephen Langford. *Compare* Dkt. 240 ¶ 1, Decl. of Bruce Scott ("I am the Facility Administrator at the Northwest Immigration and Customs Enforcement Processing Center (NWIPC)."), *with* Dkt. 67 ¶ 1, Declaration of Stephen Langford ("I am the Facility Administrator at the Northwest Immigration and Customs Enforcement Processing Center (NWIPC) . . . .").

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Northwest Detention Center." *See* Dkt. 167 ¶ 17. In other words, they sued the office, not the person. The Northwest Detention Center (also known as the Northwest ICE Processing Center), is of course a federally-contracted facility that detains immigrants like Plaintiffs. As a result, and as at least one court has recognized, the warden of such a facility is a "public officer" for purposes of Rule 25 and may be automatically substituted. *See, e.g.*, *Marshall v. Hudson*, 807 F. App'x 743, 743 (10th Cir. 2020) (substituting current warden of private detention facility for past warden pursuant to Federal Rule of Civil Procedure 25(d)).

That ICE may have chosen to hire a private contractor for the office does not change the nature of that position—the NWDC Warden is still a public officer and exercises the public function of incarcerating people. As the Supreme Court has explained "the real party in interest in an official-capacity suit" like this one "is the governmental entity and not the named official." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Similarly, the Ninth Circuit recently reiterated that it "reject[s] the notion" that "by adding an additional layer, the government can contract away its constitutional duties by having private actors rather than state actors perform some of the work." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020) (internal quotation marks omitted); *see also Bromfield v. McBurney*, No. C07-5226RBL-KLS, 2008 WL 2746289, at *9 (W.D. Wash. July 8, 2008) ("[B]ecause the power to detain immigrants is derived solely and exclusively from federal authority, the GEO defendants, in effect, acted as the government's alter ego in detaining plaintiff, and the fact that the task of detaining plaintiff and other immigrants was temporarily delegated to the GEO defendants does not convert that detention into anything other than an exclusively governmental function."). This principle that the public office is the "real party in interest" underlies Federal Rule of Civil Procedure 25(d), *Hafer*, 502 U.S. at 25, and it applies with equal force here. For this reason too, Bruce Scott can and should

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be automatically substituted for Stephen Langford.

Finally, the case law regarding the availability of injunctive relief cited above underscores this point. As Plaintiffs explained, Supreme Court and Ninth Circuit case law demonstrate that injunctive relief is available here against the NWDC Warden. But Defendant essentially claims that by changing who occupies the position of warden, a new warden can escape responsibility for ensuring constitutional conditions in the ICE facility that the warden administers. This would effectively provide a warden or private prison company with a means to escape injunctive relief by simply transferring the warden title to someone else.[2] But this is not how lawsuits against officials exercising public functions work; those administering the facility remain responsive to the courts and are obliged to respect constitutional norms regardless of who holds the office of warden. *See supra* Sec. I. For all these reasons, the NWDC Warden is a proper party here and Bruce Scott should be automatically substituted for Stephen Langford.

II. Injunctive Relief in the Form of Testing is Both Proper and Warranted.

A. GEO Has Failed to Periodically Test Staff, Even Though Testing Is a Critical Tool to Ensure Class Members' Safety.

1. *The COVID-19 Pandemic Continues to Pose a Dangerous and Deadly Threat.*

As an initial matter, and this Court knows, the United States continues to endure a health crisis unlike any that it has encountered in over a century. The COVID-19 pandemic has killed over 540,000 people, and infected over 29.7 million people in the United States in the past year.[3]

[2] Moreover, throughout this case, ICE has not taken responsibility for the actions of GEO guards with respect to masks; similarly, ICE has not implemented any testing plan as to GEO guards. These facts simply underscore that equitable relief must be available as to GEO in the event these failures threaten the constitutionally guaranteed safety of detainees. *Supra* Sec. I.

[3] Decl. of Sydney Maltese (Maltese Decl.) Ex. A, Centers for Disease Control and Prevention (CDC), *COVID Data Tracker, United States COVID-19 Cases and Deaths by State*, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Mar. 24, 2021).

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Although the approval of new vaccines has provided a glimmer of hope, the pandemic is not over, and it continues to rage across the United States and Washington state. Every day, over 750 people in Washington become infected with COVID-19, and over 56,000 are infected nationally.[4] Locally, Pierce County has a higher rate of infection and number of cases per capita than the neighboring King, Thurston, and Snohomish Counties. Suppl. Decl. of Joseph Amon (Suppl. Amon Decl.) ¶ 10. Indeed, as the public urges further lifting of restrictions, health officials have warned against premature actions that undermine continued vigilance against the virus. *Id.* ¶ 11.

Although public health experts hope that COVID-19 vaccinations will ultimately lead to herd immunity, this stage will not come about in the immediate future. Only 26 percent of Americans have received one dose of the vaccine and just 14 percent have received two doses.[5] This is far short of what experts estimate is needed for the United States to reach herd immunity, and as result, that necessary baseline level of community immunity remains many months away in Washington. Suppl. Amon Decl. ¶ 12.

Further complicating the situation is the emergence of more dangerous and more transmissible SARS-CoV-2 variants that threaten to increase the number of infections despite rising vaccination levels. *Id.* ¶ 14(d)-(e). These variants raise also further concern because they may be associated with more severe disease, are more contagious, and they may expand the age groups or health conditions that put people at high risk. *Id.* ¶ 15(d).

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[4] Maltese Decl., Ex. B, N.Y. Times, *Coronavirus in the U.S.: Latest Map and Case Count*, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states (last updated Mar. 24, 2021).

[5] Maltese Decl., Ex. C, N.Y. Times, *See How the Vaccine Rollout Is Going in Your State*, https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html (last updated Mar. 24, 2021).

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Importantly, community-level estimates of herd immunity do not necessarily protect people in congregate settings like NWDC, where there is an even greater possibility for rapid transmission than in the community. *Id*. ¶ 14(h). As Dr. Joseph Amon notes,

> [U]niversal (100%) vaccination of correctional officers, staff and detainees is needed, combined with ongoing quarantine of new intake and prevention measures (masks, distancing) for any visitors. Without universal vaccination, and without ongoing protection measures, correctional officers and staff and new intake will continue to present a risk of introducing and transmitting infection within detention facilities for many months to come, even if community-level transmission decreases, as there will likely be ongoing importation of SARS-CoV-2 virus, in variant forms, from outside of Pierce County and Washington state, for the foreseeable future.

Id. ¶ 14(j). Thus, COVID-19 continues to pose a threat to Plaintiffs.

2. *GEO Fails to Adequately Test Its Employees to Prevent the Spread of COVID-19*.

GEO's screening processes are inadequate to effectively prevent the introduction of COVID-19 into the facility from its most significant source: its own employees. According to GEO, after over a year into the pandemic, it continues to only rely on temperature checks and self-reporting as the screening mechanism to stop its employees from infecting detainees with COVID-19. As GEO has explained, "[w]hen entering the facility, the entrant has his or her temperature checked and must indicated [sic] whether in the past twenty-four hours he or she has experienced fever, chills, cough, difficulty breathing, or new loss of taste or smell, close contact with anyone diagnosed with COVID-19 in the past fourteen days."[6] Defendants' screening only asks about symptoms that they have experienced in the last 24 hours, allowing staff who experienced symptoms outside of that narrow time frame to bypass the screening and expose detainees to potential infection. Suppl. Amon Decl., Dkt. 136 ¶ 19(b).

[6] Maltese Decl., Ex. D, GEO's Suppl. Resp. to Pls.' Interrog at 4.

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More importantly, GEO still does not require any periodic testing of staff. This lack of screening fails to ensure that individuals who are infected are identified, including, in particular, those who are pre-symptomatic or asymptomatic but still contagious. These glaring deficiencies have allowed COVID-19-positive GEO staff to work at NWDC on several occasions, infecting detainees, requiring entire units to be placed on lockdown, and threatening the health of detainees. For example, in late January, a GEO guard tested positive and in turn infected detainees in the A-2 unit at NWDC. *See* Dkt. 214-1, Dkt. 216-1, Dkt. 222-1. And on several other occasions, GEO guards working in housing units have come perilously close to infecting detainees, resulting in extended quarantines for those units or for other GEO guards who worked closely to the infected person. *See, e.g.*, Dkt. 204-1, Dkt. 201-1, Dkt. 200-1, Dkt. 122-1. Indeed, just yesterday, Defendants informed the Court of yet another GEO guard who was actively experiencing COVID-19 symptoms the same day she worked at NWDC, causing "several" other GEO employees to need to quarantine. Dkt. 248-1. And in one particularly concerning instance, a GEO kitchen worker worked with detainees from throughout the facility shortly before testing positive, underscoring how quickly the virus could spread at NWDC. Dkt. 187-1.

In reviewing these multiple reports, Dr. Amon has expressed alarm. As he explains, "no testing [] appears to be conducted based on staff movement between facilities and the community." Suppl. Amon Decl. ¶ 17(d). This "shortcoming[] put[s] vulnerable individuals within NWDC at risk." *Id.* He then goes on to explain that CDC guidance recommends "[s]creening testing"—in other words, preventative screening even in the absence of COVID-19 symptoms—which can "increase the likelihood of early case identification to prevent widespread transmission." *Id.* ¶ 17(e). Notably, the CDC has also made clear that such testing is needed. As it explains, "[v]iral testing of asymptomatic staff or incarcerated/detained persons without known

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or suspected exposure to SARS-CoV-2 – known as screening testing – in correctional and detention facilities can detect COVID-19 early and stop transmission quickly."[7] Even the ICE Defendants have implemented a limited, if imperfect, scheme of prevalence testing among detainees.[8] *See* Malakhova Decl., Dkt. 183 ¶¶ 32–33 (describing ICE's "Prevalence Testing Operation Plan" following Plaintiffs' filing of a motion for a temporary restraining order); *see also* Malakhova Decl., Dkt. 202-1 ¶¶ 4–7 (status report regarding prevalence testing, noting in part that ICE Health Care Corps employees were also tested as part of the prevalence testing). As a result, Dr. Amon notes that NWDC "should expand its screening of . . . staff . . . to be better prepared to detect and respond to the introduction and spread of the coronavirus, including new and more easily transmitted variants." Suppl. Amon Decl. ¶ 17(e). Significantly Dr. Amon and other experts have repeatedly warned about the need for periodic testing throughout this case, explaining that such an approach is a much-needed prevention mechanism. Amon Decl., Dkt. 136 ¶¶ 19(b)–(j); Decl. of Dr. Robert Greifinger, Dkt. 178 ¶ 8. Nevertheless, GEO has remained idle and failed to implement such a mechanism despite these repeated warnings, despite the detainee infections GEO has caused, and despite the other close calls caused by its employees.

B. Injunctive Relief Requiring Periodic Testing Is Proper.

In its motion, the Warden's primary claim regarding testing is that "[t]his Court has no jurisdiction to compel GEO employees to be tested." Dkt. 239 at 6. For the reasons described in Section I, *supra*, that argument is baseless. To the contrary, the principles described make clear that an order requiring testing would be proper. Injunctive relief is plainly available to remedy

[7] Maltese Decl., Ex. E, Centers for Disease Control and Prevention (CDC), *Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities* (updated Mar. 17, 2021).
[8] Dr. Amon describes the shortcomings with Defendants' prevalence testing in his declaration. Suppl. Amon Decl. ¶ 17(c))

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conditions-related constitutional violations at a private detention facility. Moreover, the NWDC Warden is a proper party here, and as the chief administrator of NWDC, this Court can order him to take remedial action to protect the rights of detainees confined there.

Significantly, Defendant cites no law to support his claim that NWDC employees cannot be required to take periodic COVID-19 testing to ensure the safety of detainees. *See* Dkt. 239 at 4. But other courts *have* ordered the employees of detention facilities to submit to testing. For example, recently, in *Zepeda Rivas v. Jennings*, the court ordered the staff at the Mesa Verde Detention Center to submit to weekly rapid result tests. No. 20-cv-02731-VC, --- F. Supp. 3d ---, 2020 WL 7066346, at *11 (N.D. Cal. Dec. 3, 2020), *appeal docketed*, No. 21-15195 (9th Cir. Feb. 3, 2021). Like the facility here, the Mesa Verde Detention Center is operated by GEO. Similarly, in *Savino v. Souza*, which also concerned a facility that ICE did not directly operate, the court ordered the testing of "all . . . staff who come into contact with [immigration detainees]." 459 F. Supp. 3d 317, 332 (D. Mass. 2020). In short, other courts have recognized that they possess "whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights." *Stone v. City & Cnty. of San Francisc*o, 968 F.2d 850, 861 (9th Cir. 1992). In a global pandemic, that includes the power to order periodic testing.

C. Injunctive Relief Requiring Periodic Testing Is Warranted.

The facts described above demonstrate that an order requiring testing is warranted. As the Ninth Circuit recently reiterated, and as this Court has explained, "the Fifth Amendment requires the government to provide conditions of reasonable health and safety to people in its custody." *Hernandez Roman*, 977 F.3d at 943; Dkt. 91 at 11–12. GEO—which as explained above, must provide constitutionally-required conditions—has violated this duty when

> (i) [It] made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of

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> suffering serious harm; (iii) the [government] did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved ...; and (iv) by not taking such measures, the [government] caused the plaintiff's injuries.

Hernandez Roman, 977 F.3d at 943 (alteration in original) (quoting *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018)).

Conditions of confinement also violate a civil detainee's Fifth Amendment due process rights when they "amount to punishment of the detainee." *Bell*, 441 U.S. at 535; *see also Kingsley v. Hendrickson*, 576 U.S. 389, 397–98 (2015). Conditions are punitive when they are not reasonably related to a legitimate government objective or are excessive to that purpose. *Bell*, 441 U.S. at 539; *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

Here, the undisputed facts demonstrate that GEO has intentionally acted to place detainees in danger. Moreover, in doing so, they subject detainees to unconstitutional punishment. A court order requiring periodic testing of staff until the COVID-19 pandemic abates and class members no longer face imminent danger from it is therefore appropriate.

First, as detailed above, the NWDC Warden has made an intentional decision not to conduct prevalence testing. Plaintiffs have repeatedly cited experts and CDC guidance recommending such testing, and the ICE Defendants have implemented a similar program as to detainees. In the face of these facts, GEO staff—a primary vector by which COVID-19 can enter NWDC—are still not required to submit to the CDC's recommended "screening testing."

Second, the failure to test puts Plaintiffs at risk. Indeed, the ICE Defendants have confirmed that at least two detainees contracted COVID-19 because of exposure to GEO officers in their housing units. *See* Dkt. 214-1, Dkt. 216-1, Dkt. 222-1. Furthermore, the CDC and Plaintiffs' experts have all explained that more testing of staff is needed to minimize this risk.

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The Warden has not submitted any evidence to the contrary.[9]

Third, a reasonable official would implement periodic testing of staff. As the prevalence testing for detainees demonstrates, such testing is now easily administered on a wide scale through rapid testing tools. In addition, regular testing provides a means to detect outbreaks or possibly asymptomatic cases. Moreover, experts and the CDC alike agree that some form of testing staff who are asymptomatic is necessary to safeguard detention facilities. *See supra* Sec. II.A.2. Courts throughout the COVID-19 pandemic and before it have recognized that the failure to follow CDC guidelines "strongly indicates" deliberate indifference requiring court intervention. *Hernandez v. Cnty. of Monterey*, 110 F. Supp. 3d 929, 942–45 (N.D. Cal. 2015); *see also Ahlman v. Barnes*, 445 F. Supp. 3d 671, 691 (C.D. Cal. 2020); *Fraihat v. Immig. & Customs Enf't*, 445 F. Supp. 3d 709, 744 (C.D. Cal. 2020). The same is true here.

Last, the Warden has caused Plaintiffs injuries by failing to act. Significantly, in the context of sickness and disease, the threat to detained persons need not yet be inside a detention facility. Instead, as the Supreme Court has explained in the context of the more demanding Eighth Amendment, "prison authorities . . . may [not] ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Here, such a threat continues to exist, as Plaintiffs have explained. The large number of GEO guards testing positive in recent months, as well as the fact that such infections have spread to detainees at NWDC, underscore that the threat

[9] Indeed, now that ICE has withdrawn its motion for summary judgment, *see* Dkt. 249, the "incorporated" facts that the Warden relies on in his motion no longer exist. Instead, GEO's brief on the merits and evidence amounts to a one-page declaration from Warden Bruce Scott and a summary of statistics and citations to the number of COVID-19 cases in the federal Bureau of Prisons and the Washington Department of Corrections (without actually submitting that data into evidence). By contrast, Plaintiffs have produced voluminous evidence showing that the requested remedy here—periodic testing—is necessary and constitutionally-required.

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remains high.

Finally, for similar reasons, the failure to provide periodic screening testing of staff amounts to punishment of the civil detainees at issue in this case. As the Supreme Court has explained, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment." *Bell*, 441 U.S. at 539. Here, CDC guidance and experts alike have emphasized that testing to screen staff for COVID-19 infection is a critical component of ensuring safe detention conditions. GEO, of course, has failed to implement that protection. There is no legitimate goal related to the detention of class members that would justify this refusal to test staff for COVID-19. Widespread testing is now available, and staff testing does not interfere with *any* Defendant's ability to detain Plaintiffs.

III. If the Court Does Not Deny Defendant's Motion Outright, It Should Deny or Postpone Summary Judgment Under Federal Rule of Civil Procedure 56(d).

Under Federal Rule of Civil Procedure 56(d), deferral of summary judgment for additional discovery is proper where a party has shown "(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *Adoma v. Univ. of Phoenix, Inc.*, 779 F. Supp. 2d 1126, 1131 (E.D. Cal. 2011) (citation omitted).[10] A Rule 56(d) "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence." *Burlington N. Santa Fe. R. Co. v. Assiniboine &*

[10] The declaration of Lauren Kuhlik filed herewith satisfies these criteria.

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Sioux Tribes of Ft. Peck Reservation, 323 F.3d 767, 773–74 (9th Cir. 2003).[11] Here, class members have sought discovery regarding the Defendants' practices and implementation of COVID-19 protocols at NWDC, as discovery was limited to named Plaintiff Khan prior to class certification. Dkt. 246 (Motion for Leave to Extend Discovery). As the Court has noted, "[i]f NWIPC is not following its own protocols, Petitioners may be entitled to relief based on their claim that the conditions of confinement do not make Petitioners reasonably safe from COVID-19." Dkt. 124 at 7. Accordingly, the Court should defer consideration of the Warden's summary judgment motion to allow class members discovery regarding Defendants' implementation of COVID-19 protocols at NWDC.[12]

First, there are several issues that require further discovery in this case and are "essential" to class members' claims. These include:

- Defendants' plans to vaccinate and vaccination of detainees and staff at NWDC;
- Defendants' capacity to test for and respond to COVID-19 cases at NWDC;
- Defendants' implementation of their own COVID-19 PRR;
- Defendants' communications regarding positive COVID-19 cases, within the facility and with local public health officials;
- Defendants' response to staff who fail to abide by COVID-19 protocols at NWDC;
- Defendants' own monitoring of its compliance with COVID-19 protocols;

[11] Some of the cases that Plaintiffs cite in this section refer to Rule 56(f). The current Rule 56(d) was previously located in subsection (f) of Rule 56, but when the Rule was last revised, the new subsection (d) "carrie[d] forward without substantial change the provisions of former subdivision (f)." *See* Fed. R. Civ. P. 56, Comm. Notes on Rules for 2010 Amendments.

[12] At the Court's instruction, Plaintiffs have also filed a motion to extend deadlines for discovery and dispositive motions to seek discovery related to class members in light of the Court's recent class certification order. *See* Dkt. 224 at 2; Dkt. 246.

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- Defendants' custody determinations, particularly of those identified as high risk to more serious illness or death from COVID-19.

See Dkt. 127-1, 127-2, 127-3, 146-1, 229-1, 229-2; Dkt. 246-1, 246-2 (Discovery requests). Plaintiffs additionally plan to seek discovery regarding the identity of class members.

There is no question that the Warden (and the ICE Defendants) possess this information. In fact, Defendants have acknowledged the existence of responsive documents to specific discovery requests, and in some instances had agreed to produce responsive documents prior to the Court's denial of Plaintiffs' discovery requests. *See* Dkt, 145-1, 145-2 (ICE Defs.' Initial Responses to Pls.' Disc. Requests); Dkt. 148 (Def. Langford's Responses to Pls.' Disc. Requests).

Plaintiffs also seek Federal Rule of Civil Procedure 30(b)(6) depositions of ICE and GEO. Dkt. 246-3, 246-4 (Discovery requests). These depositions will provide critical fact-finding to Plaintiffs' theory of the case. As the Court acknowledged, "it's almost impossible to figure out whether or not [Defendants] have implemented all the COVID procedures, if you can't depose people in the facility or go to the facility yourself or interview or depose employees[.]" Dkt. 169 at 43:18-21.

Plaintiffs also seek a facility inspection that allows them to view the conditions of detention for all class members and to adequately assess the Warden's implementation of COVID-19 policies. Dkt. 246-5. Dr. Marc Stern, who conducted a previous inspection only on Mr. Khan's behalf, has not received this opportunity to date. As he describes, he is normally afforded much broader access to the facility, its personnel, its residents, and its records, and such access yields not only valuable information, but also allows him to triangulate his observations to confirm or inform a potential finding. Dkt. 247, Report of Dr. Marc Stern ¶¶ 14–15. Here, by

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contrast, he was prevented from seeing policies, materials and facilities in actual use. *See id.* ¶¶ 16-20. Specifically, Dr. Stern's inspection of NWDC was limited in several crucial ways, including:

- Dr. Stern was not allowed to interview detention officers, health care staff, or detention supervisors, which meant he could not ascertain the extent to which they understand and follow COVID-19-related policies, *id.* ¶¶ 14(a)–(c);
- Dr. Stern was not allowed to interview detained persons at NWDC, which meant he could not access information not contained in documents, such as actual practice, *id.* ¶ 14(d);
- Dr. Stern was limited to just the housing unit where Plaintiff Khan resided, as opposed to visiting numerous living units, which is important for three reasons: it overlooks the fact that detention officers (one of the vectors for COVID-19) move between multiple units, that residents themselves are often transferred between units, and the fact that COVID-19 is an airborne disease which "do[es] not honor administrative boundaries," *id.* ¶ 14(e);
- Dr. Stern could not access recorded video or logs, which meant that he could not review how COVID-19 preventive measures (like social distancing, mask-wearing and cleaning) are done outside of the timeframe captured by the inspection, *id.* ¶¶ 14(g)–(h); and,
- Dr. Stern could not review medical records in their native format, which is especially relevant for the current case involving high risk individuals and their health and safety during the pandemic, *id.* ¶ 14(i).

Because of these limitations, among others, Dr. Stern's inspection captured only a snapshot in time that precluded him from assessing the overall adequacy of COVID-19-related systems in place at NWDC. *See id.* ¶¶ 16–20. He therefore could not make any conclusions with a degree of

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reasonable certainty regarding Mr. Khan's health and safety from COVID-19, much less for other members of the class. *Id*. ¶ 34.

The Court also denied Plaintiffs' requests for documents on Defendants' historical compliance with its own policies and protocols during the pandemic. *See* Dkt. 169 4:25-5:5 ("I am not going to be looking backward in time . . . I am only going to be looking at what the current situation is at [NWDC] to determine if it is an unsafe environment."). However, Defendants' historical compliance with its policies is relevant to assessing the likelihood that they are currently complying with them. *See Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831, 851 (N.D. Cal. 2011) (citation omitted) (noting that where defendants repeatedly engaged in injurious acts in the past, plaintiffs may be able to show a likelihood that the injury will recur). For all these reasons, Plaintiff have satisfied the requirement of setting forth "specific facts that they hope to elicit from further discovery" and have shown that such facts are "essential" to this case. *Adoma*, 779 F. Supp. 2d at 1131.

Second, Plaintiffs have been diligent in seeking discovery. *See Assiniboine & Sioux Tribes*, 323 F.3d at 773–74 ("[A Rule 56(d)] continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence."). On October 21, 2020, Plaintiffs filed proposed interrogatories, requests for production of documents, and a request for a facility inspection. *See* Dkt. 127; *see also* Dkt. 146 (requesting leave to submit additional discovery requests). Plaintiffs also objected after the Magistrate Judge denied key parts of the proposed discovery. *See* Dkt. 172. In addition, two days after the Magistrate Judge recommended certifying the class, Plaintiffs filed a motion to extend discovery deadlines by 90 days: from February 18, 2021 (just about a month after Plaintiffs received the first full discovery response

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from Defendants) to May 19, 2021, to provide for adequate time to seek class-related discovery. *See* Dkt. 211. The Magistrate Judge denied the motion for an extension, but noted that "[s]hould the Court grant Petitioners' motion for class certification, Petitioners may renew their motion and identify the additional proposed discovery they seek for court approval." Dkt. 224 at 2. And now, Plaintiffs have wasted no time in doing precisely that, filing a motion to reopen discovery only six days after the class certification order. Dkt. 246. Given their limited opportunity for discovery and diligence in pursuing discovery throughout this litigation, Plaintiffs should now be permitted to pursue further discovery pending resolution of the summary judgment motion. *See Moser v. Health Ins. Innovations, Inc.*, 17-cv-1127, 2019 WL 3719889, at *15–16 (S.D. Cal. Aug. 7, 2019) (denying summary judgment where plaintiff had been granted class certification and would have an opportunity to obtain further material in the discovery period).

Plaintiffs also respectfully reiterate that this Court has erroneously limited discovery in this case. While Plaintiffs filed this case as both a habeas action and a case for injunctive relief pursuant to 28 U.S.C. § 1331, the Court has asserted this case is "primarily" a habeas case. Dkt. 124 at 6. Based on that conclusion, the Court reasoned that the parties are not entitled to the same scope of discovery as they would be in an injunctive lawsuit. However, this decision directly conflicts with multiple decisions of the Ninth Circuit, which have made clear that jurisdiction is proper under § 1331—and by extension, that normal discovery rules govern this case. *See Hernandez Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020); *Zepeda Rivas v. Jennings*, --- Fed. App'x ----, 2021 WL 631805 at *3 (9th Cir. Feb. 18, 2021). Indeed, in both these cases, the government argued that the court lacked authority to remedy plaintiffs' claims under its power to adjudicate writs of habeas corpus, and the Ninth Circuit explicitly declined to address this argument because plaintiffs brought a class action complaint for declaratory and injunctive relief.

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See Hernandez Roman, 977 F.3d at 941; *Zepeda Rivas*, 2021 WL 631805, at *3. And in both cases, the parties have not been subject to the limitations or modified discovery processes established by the Court in this case. *See, e.g.*, *Zepeda Rivas v. Jennings*, 465 F. Supp. 3d 1028, 1037 (N.D. Cal. 2020) (ordering Defendants to "respond to reasonable discovery requests from class counsel"); *Hernandez Roman v. Wolf*, No. EDCV200768TJHPVC, 2020 WL 6586313 (C.D. Cal. July 27, 2020) (referencing Plaintiffs' extensive discovery requests served on Defendants and ordering Defendants to respond).

As these cases demonstrate, discovery is necessary and appropriate to determine the actual conditions at NWDC to allow the Court to decide whether final injunctive relief is necessary. That discovery must be sufficient to answer the question of whether Defendants' actual practices provide reasonable protection to Plaintiffs against the risk of COVID-19. Given the fact-intensive nature of Plaintiffs' claim and the intervening certification of Plaintiffs' proposed class, the Court should deny or postpone Defendants' motion. At this state of the litigation, the Warden's motion is both premature and inappropriate. *See Jacobson v. U.S. Dep't of Homeland Sec.*, 882 F.3d 878, 882–84 (9th Cir. 2018) (reversing summary judgment where plaintiffs "identified several areas in which they sought discovery relevant to critical matters at issue in the summary judgment motion"); *cf. Adoma*, 779 F. Supp. 2d at 1140 (denying summary judgment to allow for discovery on class-related claim).[13]

[13] In addition, as Plaintiffs have noted, the Warden's motion is inappropriately limited to Mr. Khan, as even the ICE Defendants have recognized by withdrawing their own motion for summary judgment. *See* Dkt. 249. The Warden's choice to move only as to Mr. Khan provides yet another reason to deny his motion, as it would bind only him. *See Schwarzchild v. Tse*, 69 F.3d 293, 297 (9th Cir. 1995) (in cases where "defendants obtain summary judgment before the class has been properly certified . . . , the district court's decision binds only the named plaintiffs."); *Sharpe v. Puritan's Pride, Inc.*, 466 F. Supp. 3d 1066, 1077 (N.D. Cal. 2020) ("Because defendants filed for summary judgment before a class certified, this order binds only the named plaintiffs, and no other putative class members."). Indeed, a piecemeal ruling on

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CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion, grant Plaintiffs' cross-motion, order the periodic testing of GEO staff for COVID-19, and any other further relief that the Court may deem fit and proper.

Plaintiff Khan's claims at this stage would defeat the purpose of Rule 23(b)(2) class action, which by design enables the Court to resolve Plaintiffs' claims with a single stroke. *WalMart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 25th day of March, 2021.

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